United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-1181

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

-against-

JOSEPH RUBIN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

INTRODUCTION

This reply brief is submitted on behalf of appellant Joseph Rubin in response to points raised in the Government's brief opposing the appeal herein.

POINT I

APPELLANT RUBIN DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO THE LOYAL AND UNDIVIDED ASSISTANCE OF COUNSEL

Although the Government's brief asserts that appellant Rubin "expressly waived any conflict which might arise," it is hornbook law that a waiver of the right to the loyal and undivided assistance of counsel must be made "knowingly" and Intelligently" to be effective. Note, "Criminal Codefendants and the Sixth Amendment: The Case for Separate Counsel," 58 Georgetown L.J. 383 (1969). No one ever raised the question of whether Attorney Smith could continue to represent Rubin in light of the April 17, 1972 transcript. In view of this, there could have been no knowing and intelligent waiver of Rubin's right to the undivided assistance of counsel.*

Obviously a criminal defendant must be advised of more than thefact that a potential conflict of interest with a co-defendant might exist - he must also be advised

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* The Government's brief (at p. 7) concludes that appellant Rubin "was not deprived of his Sixth Amendment right to the effective assistance of counsel," but does not deny that appellant's counsel, Smith, owed a continuing duty of loyalty to his former client, Mayer, which disabled him from taking action at the trial which would have had an adverse effect on Mayer's interest. Neither is it denied that this continuing duty of loyalty to Mayer disabled Smith from cross-examining Agent McEllyn on the basis of the transcript of the April 17, 1972 conversation between Mayer and McElynn.

of the nature of that conflict before he can intelligently waive his right to the undivided assitance of counsel. See United States v. Sheiner, 410 F.2d 337, 342 (2d Cir. 1969), where this Court found that a defendant had knowingly and intelligently waived his right to separate counsel only after "the nature of the potential disability of joint representation had been adequately described to him." Yet there is no evidence whatsoever in the record that appellant Rubin was apprised of the nature of the conflict of interest which prevented attorney Smith from providing the undivided assistance of counsel mandated by the Sixth Amendment.

Although the record contains no evidence that appellant Rubin knowingly and intelligently waived his right to the loyal and undivided assistance of counsel, it is well-settled that any doubts in this regard must be resolved in Rubin's favor. As the Supreme Court admonished in Glasser v. United States, 315 U.S. 60, 70 (1942), where it held that a former assistant United States Attorney had not knowingly and intelligently waived his right to separate counsel, "[t]o preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." See also United States v. Lovano, 420 F.2d 769, 773 n.12 (2d Cir. 1970).

POINT II

THE CONDUCT OF THE TRIAL JUDGE ESTABLISHED AN ATMOSPHERE PREJUDICIAL TO RUBIN'S RIGHT TO A FAIR TRIAL

The Government argues four points in denying that the trial judge's conduct denied appellant a fair trial:

(a) the prejudicial effect of Judge Bartels' comments and statements is denied;

(b) the frequency of such comments and statements is said not to be enought to cause prejudice;

(c) the questions of the trial judge are said only to pursue lines opened up by the Government, by way of clarification; and

(d) Judge Bartels' charge to the jury is declared to have "blunted any possible prejudicial effect the jury might have felt" from such comments and statements.

We treat each of these points in the above order of presentation.

A. The first of these arguments rests on the Government's unsupported conclusions that the District Court "properly" limited testimony and sought merely to clarify testimony. In support of this proposition, the Government's brief singles out and attacks only individual examples *per se*, with no attention to the pattern they suggest.

Appellant Rubin does not contend that each instance cited in his main brief requires of itself reversal. Appellant argues that the cumulative impact of all of the instances was prejudicial. The cited examples serve to illustrate a continuing pattern of skepticism on the part of the trial judge with respect to appellant's defense, a pattern which persisted throughout the trial. The "cumulative effect" test of prejudice is well-recognized in this Circuit, cf. United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973).

B. The Government also argues that the questioning and comments of the Court below do not constitute error because they do not match the frequency of similar conduct in the Nazzaro case, supra, and United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973) (Br. at 13).

While citing two cases in which convictions were reversed because of more frequent judicial interventions than took place here, the Government ignores the many cases in which less frequent judicial intervention warranted a reversal.* See, e.g., United States v. Hill,

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* In the instant case approximately 157 questions and numerous comments were put to Rubin by the Court.

332 F.2d 106 (7th Cir. 1964)(a total of 35 questions put to defendant by the trial court); Lanham v. United States, 416 F.2d 1140 (5th Cir. 1969)(two defense witnesses were asked 119 and 66 questions, respectively). In Guglielmini v. United States, 384 F.2d 602, 605 (2d Cir. 1967), the Court employed a quantitative analysis in terms equally applicable here:

> "There are few pages of this defendant's testimony, which runs from page 971 to 1146 of the record, which are free of some question by the Court, and there are numerous instances where the Court took over the cross-examination from the prosecutor for extended periods."

C. The third point repeatedly alluded to in the Government's brief is that Judge Bartels' questions merely amplified and clarified points raised in cross-examination by the prosecution (e.g., pp. 12-13). The Government acknowledges precisely the point which appellant seeks to make. The trial judge pursued lines of questioning opened by the Government; he took up the cudgels in damping defense testimony, adopting the role of cross-examiner. In doing so, the trial judge violated the principle of such cases as United States v. Cassiagnol, 420 F.2d 868 (4th Cir. 1970), which is that:

> "It is important that the court minimize its own questioning of witnesses, to the end that any such judicial departure from the normal

course of trial be merely helpful in clarifying the testimony rather than prejudicial in tending to impose upon the jury what the judge seems to think about the evidence." 420 F.2d at 879.

D. The Government finally argues that Judge Bartels' charge cured whatever defects there were in the handling of the trial. Of course, it ignores the long line of cases which have held that where the cumulative effect of a court's intervention creates a prejudicial atmosphere, as in this case, a remedial charge is inadequate. See, United States v. Grunberger, 431 F.2d 1062, 1068 (2d Cir. 1970):

> "As a result of the court's varying style of interrogating the prosecution's prime witness and the defendant, the jury might have received the impression that the judge believed Burger's version of the facts to be the more plausible of the two versions. As has often been said, 'The influence of the trial judge on the jury is necessarily and properly of great weight' and 'his lightest word and intimation is received with deference, and may prove controlling.' [Citing Quercia v. United States, 289 U.S. 466 (1933)]. Moreover, instructions given in the charge to the jury that they are the sole judges of the credibility of the witnesses cannot remove the impression so created. United States v. DeSisto, 289 F.2d at 835." 431 F.2d at 1068. [emphasis added].

See also, Quercia v. United States, 289 U.S. 466 (1973); United States v. Brandt, 196 F.2d 653 (2d Cir. 1952); United States v. Dellinger, 472 F.2d 340, 386 (7th Cir. 1972); United States v. Fry, 304 F.2d 296 (7th Cir. 1962).

POINT III

THE CONSCIOUS ELECTION CHARGE BASED UPON THE FACTS OF THIS CASE WAS REVERSIBLE ERROR

As to the Court's charge, our point is a simple one. That is, the conscious election charge is only appropriate in a case where the evidence is sufficient to support a finding that the defendant had reason to know, and, therefore, an obligation to inquire, of the alleged unknown fact. In this case there is no such evidence. Accordingly, the charge was improper.

1. The authorities cited by the Government do not rebut this proposition. Rather, they support it. United States v. Joly, F.2d (2d Cir. 3/12/74), slip op. 2053, was an appeal from a conviction for the illegal importation and possession of cocaine. There the defendant was apprehended with a bag of cocaine as he attempted to get through Customs at Kennedy Airport. His furtive actions, and a bulge in his waistline, aroused the curiosity of the Customs inspector. Disclaiming knowledge of the contents of the bag, the defendant claimed that he had been approached by a co-passenger on his flight who promised him $100 if he got the bag through Customs. While he knew he was doing "something

wrong," he "really didn't know what it was" (slip. op. at 2055). Under these circumstances, the defendant Joly clearly had sufficient reason to know, or sufficient reason to ascertain the nature of the contents of the bag.

This Court, in affirming the use of the conscious election charge in Joly, did not hold, as the Government would now have it, that in all cases the mere possession of cocaine justifies the conscious election charge. Rather, it held that on the peculiar facts of that case it was more probable than not that knowledge existed. Hence the charge was proper:

> "In short, we believe that on these facts the jury was properly allowed to infer Joly's knowledge that he possessed cocaine." Slip op. 2060 (emphasis added)

In United States v. Reinaldo Olivares-Vega, F.2d (2d Cir. 4/3/74), slip op. 2657, also relied on by the Government, the defendant had even more reason to know he was dealing with cocaine. There the defendant, a long-time airline employee, was also apprehended at Kennedy Airport. Unlike appellant Rubin, who delivered a sample of procaine which happened to contain a minute, unascertainable amount of cocaine, he had in his possession a suitcase containing 13 pounds of cocaine. Like the defendant in Joly, he also had been promised $300 to deliver

the suitcase to an unknown party in New York. Based on these facts, this Court properly held that there was sufficient evidence to justify the conscious election charge:

> "Here appellant was a longtime airline employee; the suitcases seemed unusually heavy to him by his own admission; he testified he was propositioned twice by Galardo, a fellow worker, to take the suitcases to a hotel in New York; and according to his own story he was to receive $300 for delivering the suitcases to an unknown party in New York. These facts justify the charges as given by the trial court...." slip op. 2662-63 (emphasis added)

2. In its brief, the Government argues that Rubin's failure to produce notes of his interviews with drug traffickers, and what it characterizes as the "peculiar" circumstances under which the sample was obtained is enough to justify the charge (Br. 17).

How either issue constitutes the basis for a reason to know, or, in the words of this Court, "an awareness of so high a probability ... to justify the inference of knowledge"* is unexplained. Also unexplained is how any notes could exist when the undisputed evidence below was that drug traffickers refused to talk to Rubin.**

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* United States v. Joly, supra, slip op. at 2057.

** Indeed, even if notes did exist, the conduct of the Court (see appellant's main brief, pt. II), hardly encouraged their introduction.

Moreover, the circumstances under which the sample was obtained do not in any manner constitute a basis upon which Rubin would know the sample contained a minute quantity of cocaine. Indeed, just the opposite was the fact. The undisputed evidence was that the sample was obtained from one Celine Oppenheim, a friend of Rubin's, who resided on East 62nd Street in Manhattan (Tr. 273).* According to the undisputed testimony, Ms. Oppenheim was the wife of a physician who had access to and possession of many types of prescription drugs (Tr. 274). There was accordingly no reason for Rubin to question the accuracy of the representation that the sample was procaine.

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* As was brought out during the trial, the defendants were unable to locate Ms. Oppenheim and there was reason to believe she was outside the country at the time of the trial (Tr. at 383, 439).

CONCLUSION

For the foregoing reasons, and those stated in appellant's main brief, the conviction of appellant Rubin should be reversed.

Respectfully submitted,

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